

INTERNATIONAL COURT OF JUSTICE

REQUEST BY THE INTERNATIONAL LABOUR ORGANIZATION (ILO) FOR AN ADVISORY OPINION
ON THE INTERPRETATION OF ILO CONVENTION NO. 87 WITH RESPECT TO THE RIGHT TO
STRIKE

WRITTEN SUBMISSION OF THE GOVERNMENT OF CANADA

10 MAY 2024

INTRODUCTION

1. On November 10, 2023, the Governing Body of the International Labour Organization (ILO), at its 349th bis (special) session, adopted a Resolution¹ in which it decided to request the International Court of Justice (“ICJ” or “the Court”) to urgently render an advisory opinion on the following question:

Is the right to strike of workers and their organizations protected under the *Freedom of Association and Protection of the Right to Organise Convention, 1948* (No. 87)?

2. On November 14, 2023, the Registrar of the Court gave notice of the request for an advisory opinion to all States entitled to appear before the Court pursuant to Article 66(1) of the Statute of the International Court of Justice (the “Statute”), including Canada.
3. On November 16, 2023, the Court decided that States Parties to the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (“Convention No. 87” or “the Convention”)² were likely to be able to furnish it with information relevant to the request for an advisory opinion, and established May 16, 2024, as the deadline for any interested States to do so.³ Canada is a State Party to Convention No. 87, having ratified the Convention on March 23, 1972.⁴
4. In response to the invitation from the Registrar of the Court, and pursuant to Article 66(2) of the Statute, the Government of Canada wishes to submit its comments

¹ Resolution adopted by ILO Governing Body on November 10, 2023, at its 349th bis (special) session; online : <[wcms_902030.pdf \(ilo.org\)](#)>.

² Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), adopted by the International Labour Conference 9 July 1948 (entered into force on 4 July 1950), online: <[Convention C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 \(No. 87\) \(ilo.org\)](#)>.

³ International Court of Justice, Right to Strike under ILO Convention No. 87, Request for Advisory Opinion, Order dated 16 November 2023; online : <[Order on time-limits \(icj-cij.org\)](#)>.

⁴ ILO NORMLEX; online: <[Ratifications of ILO conventions: Ratifications by Convention](#)>.

pertaining to the Request for an Advisory Opinion on the Question of the “Right to Strike Under ILO Convention No. 87.”

CANADA’S COMMENTS

5. The Government of Canada welcomes the submission of the ILO’s request to the ICJ for an advisory opinion and offers the following information concerning freedom of association and the right to strike in the Canadian context, which Canada hopes is helpful to the Court in its deliberations.

6. In Canada, there is a recognized link between freedom of association and strike activity. The link is established in Canadian jurisprudence, is reflected in several free trade and labour cooperation agreements to which Canada is a Party, and is also recognized in international human rights instruments to which Canada is a Party.

CANADIAN JURISPRUDENCE

7. In 2015, a majority of the Supreme Court of Canada (the “SCC”) confirmed that freedom of association, as guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms⁵ (the “Charter”), includes strike activity to the extent that it contributes to a meaningful process of collective bargaining.⁶ In reaching its decision, the SCC considered the historical, jurisprudential and international landscape as it relates to the right to strike.

⁵ The Canadian Charter of Rights and Freedoms, *The Constitution Act, 1982*, s. 2(d); online : <[THE CONSTITUTION ACTS, 1867 to 1982 \(justice.gc.ca\)](http://www.justice.gc.ca/eng/const/acts/1867to1982.html)>.

⁶ See *Saskatchewan Federation of Labour v. Saskatchewan* 2015 SCC 4, [2015] 1 S.C.R. 245; online : <[Saskatchewan Federation of Labour v. Saskatchewan - SCC Cases \(lexum.com\)](http://www.lexum.com/)>; also referenced in ILO Office dossier Document No. 342.

8. The majority of the SCC concluded that the right to collectively withdraw services in the negotiation of a collective agreement is the “irreducible minimum” of the freedom to associate in the Canadian labour relations context.⁷ The majority held:

“... Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals.”⁸

9. The right to strike, however, is not an absolute right in Canada. Limits may be placed on strike activity if done in accordance with s. 1 of the Charter⁹, which guarantees Charter rights and freedoms “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” Limits may be justified to achieve a pressing and substantial objective if the limit is proportional to that objective.¹⁰

FREE TRADE AND LABOUR COOPERATION AGREEMENTS TO WHICH CANADA IS A PARTY

10. The Government of Canada aims to address the labour dimensions of trade and economic integration through various means, including the negotiation and implementation of trade-related Labour Cooperation Agreements and Labour Chapters of Free Trade Agreements. These agreements and chapters require that parties’ labour laws embody and provide protection for internationally recognized fundamental principles and rights at work, and that these laws are effectively enforced.

⁷ *Ibid*, at para 61.

⁸ *Ibid*, at para 75.

⁹ *Supra* note 5.

¹⁰ Government of Canada, *The Canadian Charter of Rights and Freedoms, Charterpedia, Section 1 – Reasonable Limits*, online : <[Charterpedia - Section 1 – Reasonable limits \(justice.gc.ca\)](https://www.justice.gc.ca/charterpedia/section-1-reasonable-limits)>, retrieved on April 22, 2024.

11. Several of the Labour Cooperation Agreements and free trade agreements to which Canada is a Party recognize a link between freedom of association as a fundamental principle and right at work and the right to strike. These include Canada's Labour Cooperation Agreements with Colombia,¹¹ Costa Rica,¹² Jordan,¹³ and Peru.¹⁴ The Labour Chapter of the Canada-United States-Mexico Agreement recognizes that the right to strike is linked to the right to freedom of association, which cannot be realized without protecting the right to strike.¹⁵ Similarly, the Labour Chapter of the 2023 Canada-Ukraine Free Trade Agreement (expected to come into force later in 2024) recognizes that the right to freedom of association includes protection of the right to organize and the right to strike.¹⁶

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS TO WHICH CANADA IS A PARTY

12. Canada is a Party to the International Covenant on Civil and Political Rights (ICCPR).¹⁷ Article 22 of the ICCPR establishes the right to freedom of association, including the right to form and join trade unions.

¹¹ Canada-Colombia Agreement on Labour Cooperation, 2008, see Article 1; online : <[Canada-Colombia Agreement on Labour Cooperation - Canada.ca](#)>; also referenced in ILO Office dossier Document No. 296.

¹² Canada-Costa Rica Agreement on Labour Cooperation, 2001, see Article 1 and Annex 1; online : <[Canada-Costa Rica Agreement on Labour Cooperation - Canada.ca](#)>; also referenced in ILO Office dossier Document No. 295.

¹³ Canada-Jordan Agreement on Labour Cooperation, 2009, see Article 1; online : <[Agreement on Labour Cooperation between Canada and Jordan - Canada.ca](#)>; also referenced in ILO Office dossier Document No. 298.

¹⁴ Canada-Peru Agreement on Labour Cooperation, 2008, see Article 1; online : <[Canada-Peru Agreement on Labour Cooperation - Canada.ca](#)>; also referenced in ILO Office dossier Document No. 297.

¹⁵ Canada-United States-Mexico Agreement, Chapter 23, Article 23.3, footnote 6, online : <[Canada-United States-Mexico Agreement \(CUSMA\) – Chapter 23 – Labor \(international.gc.ca\)](#)>; also referenced in ILO Office dossier Document No. 300.

¹⁶ 2023 Canada-Ukraine Free Trade Agreement, Chapter 14, Article 13.3, footnote 3, online : <[Chapter 14: Labour – Text of the 2023 Canada - Ukraine Free Trade Agreement \(international.gc.ca\)](#)>.

¹⁷ International Covenant on Civil and Political Rights, adopted 16 December 1966, United Nations General Assembly resolution 2200A (XXI) (entered into force 23 March 1976), online : <[International Covenant on Civil and Political Rights | OHCHR](#)>; also referenced in ILO Office dossier Document No. 285.

13. Canada is also Party to the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),¹⁸ which recognizes the right to strike. Article 8 of the ICESCR establishes the right of everyone to form trade unions and to join the trade union of their choice; the right of trade unions to function freely subject only to limitations prescribed by law; and the right to strike, provided that this right is exercised in conformity with the laws of the particular country.
14. Canada notes the intended complementarity between both Article 22 of the ICCPR and Article 8 of the ICESCR, and Convention No. 87, which was already in force when the ICCPR and ICESCR were negotiated. Article 22(3) of the ICCPR and Article 8(3) of the ICESCR specify that the respective covenant does not authorize State Parties to Convention No. 87 to “take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.”

CONCLUSION

15. Under international law, Canada and other States Parties to the ICESCR must respect, protect and fulfil the right to strike.
16. The link between the right to freedom of association and strike activity is also recognized in the Canadian context. However, the right to strike in Canada is subject to reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
17. The Government of Canada remains firmly committed to promoting respect for fundamental principles and rights at work, including the right to freedom of

¹⁸ *International Covenant on Economic, Social and Cultural Rights*, adopted 16 December 1966, United Nations General Assembly resolution 2200A (XXI) (entered into force 3 January 1976), online: < [International Covenant on Economic, Social and Cultural Rights | OHCHR](#) >; also referenced in ILO Office dossier Document No. 284.

association. We look forward to the ICJ's advisory opinion on whether the right to strike of workers and their organizations is protected under Convention No. 87.

Respectfully,

A handwritten signature in blue ink, appearing to read 'A. Kessel', with a long horizontal flourish extending to the right.

Alan H. Kessel
Assistant Deputy Minister and Legal Adviser,
Global Affairs Canada